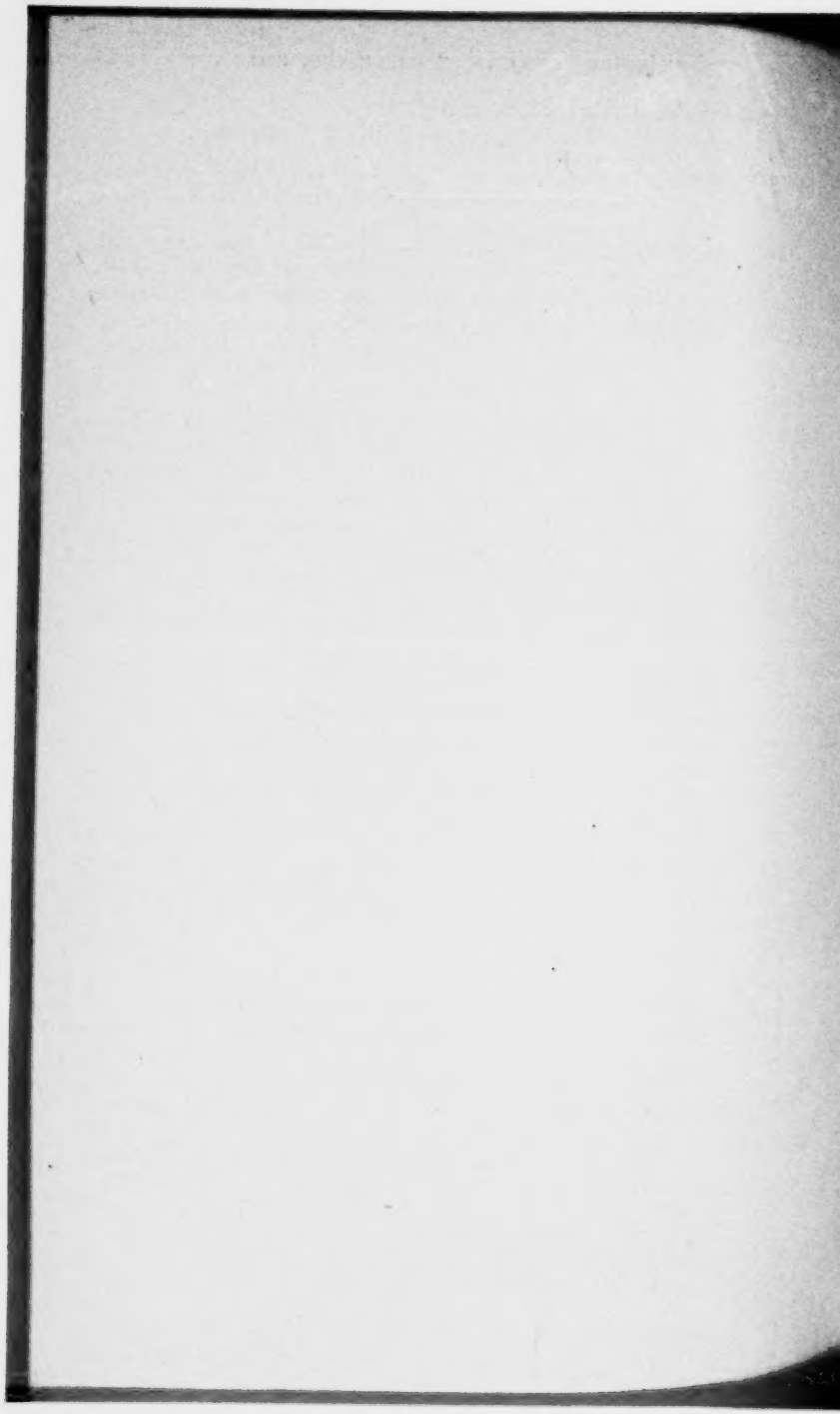

No. 81.

Br. of Bowers for P. C. on mo.

FILED
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JAMES H. McKENNEY,
Clerk.

Filed April 11, 1901.

Supreme Court of the United States,

OCTOBER TERM 1900.

No. 81.

THE GULF & SHIP ISLAND RAILROAD COMPANY, ET ALS.,
PLAINTIFFS IN ERROR,

versus

GEO. P. HEWES, TAX COLLECTOR OF HARRISON COUNTY, MISSISSIPPI,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

EATON J. BOWERS,
Solicitor for Plaintiff in Error.

"The Legal Printer," J. G. Hauser, 62 Camp St., N. O., La.

(17,441)

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BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

In Error to the Supreme Court of Mississippi.

This motion should be denied. It is an attempt on the part of defendant in error to evade a decision upon the merits of this case, *i. e.* the existence of the exemption claimed in the pleadings and the validity thereof.

The grounds of the motion are:—

1st. That no Federal question is raised or involved.

2nd. That no Federal question was raised at the proper time or in the appropriate way, and

3rd. That the Supreme Court of the State of Mississippi in the Mississippi Mills case held exemptions to be repealable, and that the pleadings in this case show that the railroad was built upon the faith of a reliance in the Mississippi Mills case.

The first two grounds are practically the same and may be discussed together.

We fail to understand the theory upon which the defendant in error contends that no Federal question is raised by the pleadings. By the amendment to the bill filed September 27th, 1897, and found on pages eight and nine of the transcript filed in this cause, it is stated:—

"Complainant further says and charges that the charter "aforesaid and the exemption from taxation aforesaid was "and constituted a contract between the incorporators and "stockholders of complainant corporation and the State of "Mississippi; that the State of Mississippi would not de- "mand from complainant any taxes whatever upon its capi- "tal, its stock, its railroads and appurtenances, and upon "any of its property in this State necessary or incident to the "full exercise of the powers of such charter granted for the "term of 20 years from the enactment of said charter, to-wit: "the twenty-third day of February, 1882, and that the in- "corporators and stockholders of complainant and the com- "plainant, acting under the faith of the said contract of ex- "emption and being thereto moved and induced by reason "of the said contract of exemption, entered upon the con- "struction of the road aforesaid and the branches and side "tracks aforesaid and completed the same at a cost of about "one million dollars with the full faith and belief that said "contract of exemption contained in complainant's charter "would be respected and observed by the said State, and "that but for the said contract of exemption and the faith "and belief of complainant, its incorporators and stockhold- "ers, in the good faith of the State in maintaining and ob- "serving its said contract, said railroad, branches, side "tracks, etc., would never have been built."

"And complainant further says that while it is contended "by the said tax collector and, as complainant is advised and

"believes, by the board of supervisors of Harrison county, "Mississippi, that the said exemption from taxation has been "repealed by the provisions of the Annotated Code of 1892, "which said contention complainant now avers is utterly un- "true, still complainant pleads and shows that it is not in "the power of the State of Mississippi to repeal the said ex- "emption from taxation for the reason that the same consti- "tutes a contract upon which complainant, its stockholders "and corporators have acted, and upon the faith of which "they have expended prior to said alleged repeal, large sums "of money in and about the construction of said railroad, "its branches and side tracks, to-wit, the sum of one million "dollars."

"And complainant says that to permit the State to repeal "its contract of exemption so entered into by it would be a "violation of the 10th section of Article One of the Consti- "tution of the United States of America; and complainant "pleads the protection of the said section and article of the "Constitution of the United States of America against any "repeal of the said exemption and in support of its exemp- "tion aforesaid."

From this it will be seen that the contract clause of the Constitution was expressly insisted upon and its protection invoked.

It may be said that the bill fails to set forth the particular statute or law which it is claimed violates the provision of the contract of exemption; in reply to this we say, that the pleading is as specific as it was possible at that time to make it. The demurrer was first sustained on the ground that the exemption was unconstitutional and that the general taxing law subjected the property of plaintiff in error, in common with all the other property in the State, to taxation. No particular act was cited or pointed out by the defendant in error as working its repeal. He averred in a general way the taxing law of the State an dthe Code of 1892, just as it is set forth in the amendment to the bill. But in addition to all this, we have here one of those cases in which the Federal question need not be specifically raised; indeed the decision of the court, adverse to the claim of exemption and contract, car-

ries with it, of necessity, the decision of the Federal question as to which no express averment in the pleadings is necessary.

In the case of Y. & M. V. R. R. vs. Wirt Adams, No. 35, October Term 1900, practically identical with this (except as to the consolidation feature upon which the cause was finally decided upon the merits) a motion similar to this was overruled, and in passing upon it Justice Brown aptly said:—

> " But upon the hearing of the case under consideration the " court (now differently constituted) overruled both of these " cases, and held, first, that the Legislature could not grant " an exemption to a railway company under the Constitu- " tion of 1869; second, that it could not grant an irrepealable " exemption under that Constitution; third, that a new com- " pany was formed by the consolidation of October 24, 1892, " and no exemption passed into it; fourth, that if the con- " solidation was a technical merger, still section 180 of the " Constitution of 1890 prevented any exemption from pass- " ing into it; fifth, that any such exemption was repealed by " the Acts of 1884, 1886 and 1890. Manifestly, that court " could not have held the railways liable for the taxes in suit " without deciding either that the provision of section 21 did " not constitute a legal contract in view of the Constitution " of 1869, or that no such contract existed in favor of the " plaintiffs in error in view of the consolidation, or that the " subsequent tax legislation of the State of 1892 and 1894 " did not impair the obligation of that contract. All those " were Federal questions, the vital one being whether the " Acts of 1892 and 1894 impaired the obilgation of the " contract, if any existed."
>
> " In short, the case is one of those frequently arising un- " der the second clause of R. S., Section 700, in which the " validity of a State statute under the Constitution of the " United States is necessarily drawn in question, and the " decision of the State court being in favor of its validity, " this court will take jurisdiction, though the Federal ques- " tion be not specially set up or claimed. As we have repeat- " edly had occasion to hold, it is only in cases arising under " the third clause of the section where a right, title, privilege " or immunity is claimed, that the Federal question must be

" specially set up. The cases are collected in Water Power " Company vs. Electric Street Railway Company (172 U. S. " 475, 488). Thus, in Wilson vs. Blackbird Creek Marsh " Co. (2 Pet. 245) the record did not show that the constitu- " tionality of an act of a State legislature was drawn in " question; but, said the Chief Justice, 'we think it impos- " sible to doubt that the constitutionality of an act was the " question and the only question, which could have been dis- " cussed in the State court.' So, in Satterlee vs. Matthew- " son (2 Pet. 380), it was said that if it sufficiently appear " from the record itself that the repugnancy of the statute " of a State to the Constitution of the United States was " drawn in question, this court has jurisdiction, though the " record does not in terms declare that this question was " raised. See also Crowell vs. Randell (10 Pet. 368); Fur- " man vs. Nichol (8 Wall. 44); Chicago Life Insurance Co. " vs. Needles (113 U. S. 574); Eureka Lake Co. vs. Yuba " County (116 U. S. 410); Kaukauna Co. vs. Green Bay " Canal (142 U. S. 254). And the fact that the Supreme " Court of the State did not expressly refer to the contract " clause of the Constitution does not prevent our taking jur- " isdiction, if the applicability of such clause were necessar- " ily inolved in its decision. As was said by Chief Justice " Waite in Chapman vs. Goodnow (123 U. S. 540, 548), 'If " a Federal question is fairly presented by the record, and " its decision is actually necessary to the determination of " the case, a judgment which rejects the claim, but avoids " all reference to it, is as much against the right, within the " meaning of section 709 of the Revised Statutes, as if it had " been specially referred to and the right directly refused.'

" The decision of the Supreme Court that the exemption " in the Mobile and Northwestern Railroad Company's char- " ter of 1870 was void under the Constitution of 1869, was " practically a decision that the contract of the State was " beyond the power of the Legislature and void, and hence " there was no contract to be impaired. But conceding this " contract to have been valid, another distinct question arose, " whether that contract enured to the benefit of the plaintiffs " in error by the successive consolidations—in other words, " whether, as to the plaintiffs in error, there was any con-

"tract ever existing which the taxing legislation of Missis-
"sippi could impair. Both these questions were ruled
"against the railroads; and while the contract clause of the
"Federal Constitution was not discussed, the case turned
"upon the existence of such a contract, and no question
"seems to have been made that, if there had been a contract,
"it was impaired by the taxing legislation of 1892. As we
"have often held, that where an impairment of a contract by
"State legislation is charged, the existence, or non-existence
"of the contract is a Federal question, it is impossible to es-
"cape the conclusion that the foundation of the whole case
"was, whether there was really a contract which had been
"impaired, and that this was necessary to the determination
"of the case. As already stated, this was a Federal ques-
"tion, and the fact that the Supreme Court did not in terms
"discuss the contract clause of the Constitution does not oust
"our jurisdiction.

"In view of the record and the opinions of the Supreme
"Court, the certificate of the Chief Justice, that the validity
"of the State statutes was actually drawn in question under
"the contract clause of the Constitution, was but a further
"assurance of a fact already appearing. The motion to dis-
"miss must, therefore, be denied."

It will be apparent from an inspection of these pleadings, together with the opinion of the court in Case No. 35 *supra*, and authorities in that case cited, that the Federal question was not only sufficiently raised, but that it inheres in the cause and decision, and that the result reached by the Supreme Court of Mississippi was impossible except upon the theory of a denial of the contract rights claimed by plaintiff in error.

Just what is meant by the suggestion that no Federal question was raised at the proper time, or in the appropriate way, we do not exactly understand. If it is intended to aver that it was incompetent to raise such a question by an amendment of the bill,

we reply by a citation to Section 542 of the Annotated Code of Mississippi, 1892, and the following decisions:

Richardson vs. Rolfe, 31 Miss. 616;
Ward vs. Whitfield, 64 Miss. 754;
Smith vs. Harrington, 49 Miss. 771;
Kimbrough vs. Curtis, 50 Miss. 117;
Hanserd vs. Gray, 46 Miss. 75;
Jeffries vs. Jeffries, 66 Miss. 216;

from which it is clear that it is the practice in Mississippi to allow amendments liberally at any stage of the proceedings, and that amendments incorporated in the bill at any time have the same effect as if they had been originally written therein; besides, by the order sustaining the first demurrer, signed September 13th, 1897, filed September 16th, 1897, complainant is expressly given leave to amend his bill and it must be apparent that this leave was given for the express purpose of permitting the insertion of the allegation raising the Federal question.

If it was intended, as we infer from page seven of appellee's brief, to urge that the Federal question was ignored or waived because it was not expressly assigned as error in the Supreme Court of Mississippi, we reply that the settled practice in Mississippi in chancery cases is to assign but one error, *i. e.* that the court erred in the rendition of the decree below, and under this assignment every question is raised. This is especially true where a case stands on bill and demurrer, because but one error was committed, the error or sustaining the demurrer and dismissing the bill.

A resort to the brief filed in that court will demonstrate beyond cavil that the Federal questions were fully discussed, and the same fact appears from the certificate of the Chief Justice of the State of Mississippi, who certifies as follows:—

"I. Thomas H. Woods, Chief Justice of the Supreme "Court of the State of Mississippi at the present time, and "upon the argument and hearing of the above-entitled ap- "peal, do hereby certify:

"I. That upon said argument and hearing the validity "of legislation of said State of Mississippi subsequent to the "statute thereof of February 23, 1882, was drawn in ques- "tion by the Gulf & Ship Island Railroad Company on the "ground of such legislation being repugnant to Section 10 of "Article 1 of the Constitution of the United States, in that "such legislation impaired the obligation of a contract be- "tween the State of Mississippi and said Gulf & Ship Is- "land Railroad Company, and that the decision of said Su- "preme Court of Mississippi was in favor of the validity of "such legislation and such constitutional provision.

"II. That upon said argument and hearing the validity "of the statutes of Mississippi in the Annotated Code of "1892, providing for the taxation of railroads *were* drawn "in question by the said Gulf & Ship Island Railroad Com- "pany on the ground of their being repugnant to the Con- "stitution of the United States and the 14th amendment "thereto, in that in and by said statutes the State of Missis- "sippi denies to the said Gulf & Ship Island Railroad Com- "pany within its jurisdiction the equal protection of the "laws, and that the decision of the said Supreme Court of "Mississippi was in favor of the validity of the said statutes.

"In witness whereof I have hereunto subscribed my name "this day of May, in the year of our Lord one thousand "eight hundred and ninety-nine.

"THOMAS H. WOODS,
"Chief Justice of the Supreme Court of Mississippi."

The fact that the bill charged that the railroad was constructed on the faith of the Mississippi Mills case does not deprive plaintiff in error of the benefit of the Federal question thus distinctly raised. The bill is to be considered as a whole so that each allegation must mean something; the contract of exemption was clearly set forth and by the first amendment, the right of the State to abrogate it was expressly challenged and the protection of the Federal Constitution specifically invoked. Nothing in the stipulation filed after the cause had reached the Supreme Court destroyed the force of this pleading. It must be apparent that it was the intention of the parties to stipulate that the complainant

was to have such benefit as might accrue to it from the proposition that it had constructed its road, relying on the faith of the decision in the Mississippi Mills case *as to the original constitutionality of such exemption.* No other construction is consonant with reason and no other will permit the whole bill to stand.

Besides, it is apparent that the Supreme Court of the State of Mississippi has decided the Federal question raised in this case adversely to plaintiff in error. Inasmuch as no written opinion was rendered or filed in the case this court is remitted entirely to the certificate of the Chief Justice as to what was tried and decided and that certificate emphatically and unequivocally states that the Federal questions were raised and decided adversely to plaintiff in error.

The pleadings in this case show that the question was properly presented, was germane, and should have been determined; and the certificate of the Chief Justice shows that it actually was determined adversely to plaintiff in error.

On that state of case this court in Armstrong vs. Athens County, 16th Peters, page 286, said:—

> " In the case now before us the presiding judge of the Su-
> " preme Court of Ohio has certified on the record that the
> " validity of a statute of the State was drawn in question,
> " on the ground that it was repugnant to the Constitution of
> " the United States, and that the decision was in favor of the
> " validity of said statute: and this certificate of the judge is
> " certified by the clerk, as a part of the record. We pre-
> " sume that the certificate of the presiding judge was made
> " by the authority of the court; and as this bill and answer
> " show that such a point might have arisen, and this certifi-
> " cate on the record states that it did arise, and was decided,
> " the case comes within the fourth clause above mentioned,
> " and this court must take jurisdiction, and examine whether
> " the point so certified was rightfully decided."

In the late case of C. B. & Q. Railroad Co. vs. Chicago, 166 U. S. p. 226, Justice Harlan in overruling the motion to dismiss, used the following language:—

"Now the right in question was distinctly asserted by the "defendant in its written motion to set aside the verdict and "grant a new trial. Among the grounds for a new trial "were the following: That the several rulings of the court in "excluding proper evidence, the statute under which the "proceedings for condemnation were instituted, and the ver- "dict of the jury and the judgment based upon it, were all "contrary to the 14th amendment declaring that no State "shall deprive any person of life, liberty or property with- "out due process of law, nor deny to any person within its "limits the equal protection of the laws."

"When the trial court overruled the motion for a new "trial and entered judgment it necessarily held adversely to "the claims of the Federal right."

* * * * * * *

"It is true that the Supreme Court of Illinois did not in "its opinion expressly refer to the Constitution of the United "States. But that circumstance is not conclusive against "the jurisdiction of this court to re-examine the final judg- "ment of the State court. The judgment of affirmance "necessarily denied the Federal rights thus specially set up "by the defendant; for that judgment could not have been "rendered without deciding adversely to such claims of "right. Those claims went to the foundation of the whole "proceeding so far as it related to the railroad company, and "the legal effect of the judgment of the Supreme Court of "the State was to deny them."

In C. B. & Q. Railroad Co. vs. Nebraska, 170 U. S., at page 66, Mr. Justice Shiras said:—

"This subject has been so frequently and so recently dis- "cussed by this court that it is unnecessary for us to further "consider it at large. It is sufficient to say that this record "discloses that the plaintiff in error, in its answer to the "writ of *mandamus* issued out of the District Court of "Douglass county, State of Nebraska, claimed that by rea- "son of certain provisions of its charter, of general laws of "the State, and of the ordinances of the city of Omaha, all "of which were specifically set forth, a contract was created "between the plaintiff in error and said city in respect to the

"viaduct in question, the obligations whereof would be vio-
"lated by the proposed enforcement of the subsequent Act
"of 1887, contrary to the provisions of the Constitution of
"the United States; that the District Court held that the
"laws and ordinances so pleaded did not create a contract
"between the State and city on the one side and the plaintiff
"in error on the other; that the plaintiff in error in its pe-
"tition in error to the Supreme Court of the State, specific-
"ally assigned as error the holding of the lower court, that
"the said laws, charter, and ordinances did not constitute a
"contract within the meaning and protection of the Consti-
"tution of the United States, guaranteeing the inviolability
"of contracts; and that the Supreme Court of the State, in
"its opinion disposing of the case states that 'the most im-
"portant subject of inquiry presented by respondent's con-
"tention that the ordinances under which the city proceeded
"in ordering the repairs in question contemplates the taking
"of its property without due process of law within the mean-
"ing of the State and Federal Constitutions, and also im-
"pairs the obligation of the contract under which its track
"was laid and under which said viaduct was constructed.'

"We think it is plain, from this recital, that a Federal
"question was specifically presented in both the trial and
"Supreme Court of the State.

"As the record further discloses that the State Supreme
"Court overruled the railroad company's contention that it
"held an existing contract whose obligation would be vio-
"lated by the enforcement of the provisions of a subsequent
"law of the State, it becomes the duty of this court to inquire
"whether there was error in that judgment of the Supreme
"Court of the State."

On the Merits.

Notwithstanding the fact that exemptions such as appear in the charter under consideration were repeatedly granted by a long line of legislative acts, beginning with the adoption of the Constitution of 1869 and running up to its repeal by the Constitution of 1890, all of which have been upheld by a uniform course of

decisions in the courts, by unvarying recognition by the executive department, and by numberless refusals on the part of the Legislature to repeal its grants, they are at this late day challenged in the opinion of the Supreme Court of Mississippi in the case of Adams vs. Mississippi Mills, 77 Mississippi, 194, and that gratuitously, when the question of the validity of these exemptions was not raised in the pleadings or urged in the argument.

One of the many old cases in which this question was involved found its way to this court, and your Honors will recall that in Yazoo Railroad Company vs. Thomas, 132 U. S. 174-184, Chief Justice Fuller, commenting upon this fact, said:—

> "The Supreme Court of Mississippi did not put its de-
> "cision upon the ground that it was not competent under the
> "State Constitution for the State to contract with the com-
> "pany that the latter should not be subjected to taxation."

All these contracts for exemption, upon the faith of which millions have been invested in Mississippi, are now to be torn up by the roots, and the State is to impair the obligation which it assumed and repudiate the contract which was made with investors. Surely there never was an instance presented to the court in which the protection of the contract clause of the Federal Constitution should more clearly apply—never a case which came more completely within the very evil contemplated by the framers of the Constitution—never a case in which the plighted public faith has been more grossly broken and solemn obligation more indefensibly violated. That such a controversy essentially involves a Federal question of the gravest kind must be self-evident.

No extended argument is deemed necessary here upon the nature and effect of this contract. A few suggestions are, however, submitted in order to satisfy the court that the points are serious and that the questions warrant full argument upon the merits and the most careful consideration.

As early as 1878, four years before the granting of the charter in suit, the Supreme Court of Mississippi in the case of Missis-

sippi Mills vs. Cook, 56 Miss. 40-52, construing the provisions of Section 13 of Article XII, of the Constitution of 1869, determined that this section did not of itself prohibit exemptions, but only declared the liability of corporations to taxation in the discretion or judgment, and subject to the control of the Legislature. This authoritative construction of the Constitution, subsequently reiterated in Railroad Company vs. Lambert, 70 Miss. 779 (*vide* 180 U. S. at p. 13), became as much a part of the Constitution of 1869 as the text itself (Douglass vs. County of Pike, 101 U. S. 677). And that this construction of the meaning of the Constitution of 1869 was not strained or unreasonable is shown by the legislation of Mississippi for many years prior to the adoption of that Constitution, from which it appears that the Legislature, when granting charters of incorporation, had often thought it necessary to provide that the corporations should be "subject to taxation," the terms of the provisions being either precisely like those adopted in the Constitution of 1869, or having the same effect in substance. The construction adopted in Mississippi Mills vs. Cook, therefore, involved no departure or change or new rule in regard to corporate taxation.

The power to exempt under that Constitution has been repeatedly adjudged in the courts of Mississippi in a series of cases beginning with Mississippi Mills vs. Cook, 56 Miss. 40 (1878).

The same view of the validity of these exemptions prevailed in the other departments of the State government. The executive officers of the State, including its law officers, uniformly, for fully twenty years, adopted the same construction and consistently acted upon it. In the judicial department the decision in Mississippi Mills vs. Cook, *supra,* was followed without break for twenty years, as will be seen by reference to the following cases involving, in one way or another, the question of the constitutionality of exemptions under the Constitution of 1869: McCullock *et al.* vs. Stone, 64 Miss. 378; Y. & M. V. R. R. Co. vs. Thomas *et al.*, 65 Miss. 378; Vicksburg Bank vs. Worrell, 67 Miss. 47; Attala County vs. Kelly, 68 Miss. 40; L. N. O. & T. Ry. Co. vs. Taylor,

68 Miss. 361; Railroad Co. vs. Lambert, 70 Miss. 779. And this is again strikingly reiterated in the recent opinion in the Tombigbee Mills case.

The journals of the Legislature of the State of Mississippi will show that at nearly every session of the Legislature for fifteen years prior to the institution of this suit, attempts were made to repeal the exemptions enjoyed by railroad companies from taxation, all of which were by decisive majorities defeated.

This writer has sat in three sessions of the Legislature since the institution of this suit, in each of which an attempt was made to repeal these exemptions, and in each case the bill proposing so to do was lost.

This long-continued practice of the legislative, executive and judicial departments ought to be most convincing as to the legality of these exemptions. No rule of interpretation is better settled in this court than that which gives the greatest weight to such practice and interpretation. In The Laura, 114 U. S. 411, 416, Mr. Justice Harlan, citing Stuart vs. Laird, 1 Cranch 299, 308, said:—

> "Touching the objection now raised as to the constitu-
> "tionality of the legislation in question, it is sufficient to say,
> "as was said in an early case, that the practice and acquies-
> "cence under it, 'commencing with the organization of the
> "judicial system, affords an irresistible answer, and has in-
> "deed fixed the construction.'"

And in Ogden vs. Saunders, 12 Wheat. 213, 290, Mr. Justice Washington said that the doctrine—

> "proceeds upon the presumption, that the contemporaries of
> "the Constitution have claims to our deference on the ques-
> "tion of right, because they had the best opportunities of
> "informing themselves of the understanding of the framers
> "of the Constitution, and of the sense put upon it by the
> "people when it was adopted by them."

In view of the fact that the investment by stockholders and creditors of the railroad company was clearly made in reliance

upon this established practice as to exemptions and of the authoritative interpretation of the highest court of the State affirming the constitutional power to exempt, the following language of Mr. Justice Swayne in Township of Pine Grove vs. Talcott, 19 Wall. 666, 667, is singularly applicable:—

> "When the bonds were issued, there had been no such
> "authoritative intimation from any quarter that such stat-
> "utes were invalid. The Legislature affirmed their validity
> "in every act by an implication equivalent in effort to an
> "express declaration. And during the period covered by
> "their enactment, neither of the other departments of the
> "government of the State lifted its voice against them. The
> "acquiescence was universal."

See also Brisco vs. The Bank of the Commonwealth of Kentucky, 11 Pet. 257, 318; Prigg vs. The Commonwealth of Pennsylvania, 16 Pet. 559, 619; Cooley vs. Board of Wardens of Port of Philadelphia *et al.*, 12 How. 299, 315; Aufmordt vs. Hodden, 137 U. S. 310, 32;9 Schell's Executors vs. Fauche, 108 U. S. 562, 672; Field vs. Clark, 143 U. S. 649, 691; McPherson vs. Blacker, 146 U. S. 127; Kennedy vs. Gies, 25 Mich. 83, 92. The Mississippi authorities are to the same effect. Daily vs. Swope, Guardian, Etc., 47 Miss. 367, 385; French vs. The State, 52 Chrisman vs. Brookhaven, 70 Miss. 477, 483.

As Simrall, J., said in Hawkins *et al.* vs. Carroll Co., 50 Miss. 735, 752 (1874):

> "At the time of the adoption of the Constitution, the
> "power of the Legislature to authorize municipal aid to
> "those enterprises, coupled with the delegated authority of
> "taxation, was well established, both by legislative prece-
> "dents and judicial decisions in this and the other States."

The defendant in error contends that the Supreme Court of the State of Mississippi has decided that the exemption contained in the charter of plaintiff in error has been repealed, and that this decision is merely the construction by the State court of its own local laws, raising no Federal question.

In other words, the position is that the decision of a State court, as to whether a contract is still in existence or has been waived, is conclusive on this court. This is not the rule. The question as to the existence of a contract as well as its true construction has been in all cases determined by this court independently of the decisions of the State court, and in some cases in direct opposition to the rulings of these tribunals. Ohio Life Insurance and Trust Company vs. Debolt, 16 How. 416, 432; Jefferson Bank vs. Shelly, 1 Blac. 436, 443; Bridge Proprietors vs. Hoboken Co., 1 Wall. 116, 145; Delmas vs. Insurance Company, 14 Wall. 661, 668; Railroad Companies vs. Gaines, 97 U. S. 697, 709; University vs. People, 99 U. S. 309, 321, 323; Wright vs. Nagle, 101 U. S. 791, 793; Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 344, 356; Memphis Gas Co. vs. Shelby County, 109 U. S. 398, 399; Vicksburg, Etc. Railroad Co. vs. Dennis, 109 U. S. 665, 667; Given vs. Wright, 117 U. S. 648, 655; N. O. Water Works vs. La. Sugar Co., 125 U. S. 18, 38; Yazoo Railroad Co. vs. Thomas, 132 U. S. 174, 184; McGahey vs. Virginia, 135 U. S. 662, 669; Wilmington & Weldon Railroad vs. Alsbrook, 146 U. S. 275, 293; Bryan vs. Board of Education, 151 U. S. 639, 649; Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, 492; Shelby County vs. Union, Eetc., Bank, 161 U. S. 174, 185; Douglass vs. Kentucky, 168 U. S. 488, 502; McCullough vs. Virginia, 172 U. S. 102, 109; Water Power Co. vs. Street Railway Co., 172 U. S. 475, 487.

In a number of the foregoing cases motions were made to dismiss upon the ground that the construction by the State court of its own Constitution and laws was binding upon this court, but in every instance the motion to dismiss was denied. In Yazoo Railroad Co. vs. Thomas, 132 U. S. 174, 184, a motion to dismiss was made upon very much the same ground as that urged in the case at bar; and in overruling the motion Chief Justice Fuller said:—

> "The taxes in question were assessed under the Act of
> "1888, and if the charter of the company, which became a
> "law on the 17th of February, 1882, inhibited such taxa-

"tion, then this court has jurisdiction to re-examine the con-
"clusion reached. Although by the terms of the Act of
"1888 the taxes therein referred to were not to be levied as
"against a railroad exempt by law or charter, yet the Su-
"preme Court held that this company is not exempt, and is
"embraced within the Act; so that if a contract of exemption
"is contained in the company's charter, then the obligation
"of that contract is impaired by the Act of 1888, which
"must be considered, under the ruling of the Supreme
"Court, as intended to apply to the company. The result
"is the same, although the Act of 1888 be regarded as sim-
"ply putting in force revenue laws existing at the date of the
"company's charter, rather than itself imposing taxes, for
"if the contract existed those laws became imperative, and
"would be reinstated by the Act of 1888. The motion to
"dismiss the writ of error is therefore overruled."

In no class of cases has this court oftener exercised its power to determine for itself the existence of an alleged contract than in the long line of decisions involving so called exemptions or immunities from taxation.

Therefore, even if the State court had only decided that the rights acquired under section 18 had been lost by repeal and that a contract no longer existed, it would have clearly rendered a decision upon a Federal question, pure and simple.

In the following cases the court determined for itself whether or not there was still an existing contract or whether the rights acquired thereunder had been waived or in any manner lost or surrendered. Morgan vs. Louisiana, 93 U. S. 217-219; Railroad Co. vs. County of Hamblin, 102 U. S. 273, 275; Wilson vs. Gaines, 103 U. S. 417; Louisville & Nashville R. R. Co. vs. Palmes, 109 U. S. 244, 256; Memphis Railroad Co. vs. Commissioner, 112 U. S. 609, 617; St. Louis, Etc., Railroad Co. vs. Berry, 113 U. S. 465, 472; Chesapeake & Ohio Railroad Co. vs. Miller, 114 U. S. 176; Given vs. Wright, 117 U. S. 648, 655; Keokuk & Western Railroad Co. vs. Missouri, 152 U. S. 301, 305; Mobile & Ohio R. R. Co. vs. Tennessee, 153 U. S. 486, 492;

St. L. and S. F. Railway vs. Gill, 156 U. S. 649, 656; N. & W. Railroad vs. Pendleton, 156 U. S. 667, 673; Mercantile Bank vs. Tennessee, 101 U. S. 161, 171.

It is interesting to note the statutes which have been construed into conflict with these chartered rights.

Section 2 of Chapter 22 of the Acts of 1884, pages 30 and 31, provides that certain railroads, naming them, (and it is significant that the Gulf & Ship Island is not among those named), should pay privilege taxes at rates therein stipulated, in lieu of all other taxes claimed of them. By that section every railroad in the State liable to taxation was enumerated, and no mention is made of the Gulf & Ship Island Railroad which had been chartered two years prior to that time. At the conclusion of the list of railroads liable to taxation the following was inserted: "*All railroads not named herein* AND NOT EXEMPT FROM TAXATION BY THEIR CHARTER, sixty dollars per mile." From this it must be apparent that it was the intention of the Legislature to lay down a rule for the taxation of every road in the State, and that all charters which, like that of the Gulf & Ship Island Railroad, contained an express exemption which had not expired were to be taken out of the operation of the act and relieved of taxation.

But it is insisted that exemptions theretofore existing, even though specially recognized by that Act were repealed by Section 6 of Chapter 1 of the Acts of 1886, page 23 thereof; that section is as follows:—

> "SEC. 6. *Be it further enacted,* That the Act entitled "'An Act to amend Sections 607 and 608 of the Code of "1880, in relation to privilege taxes on railroads, approved "March 13, 1884, be so amended as to fix the amount of "privilege tax *to be paid by the several railroad companies "mentioned and referred to in said Act at sums twenty-five "percentum greater respectively than the sums mentioned in "said Act;* and hereafter said railroad companies shall pay "privilege taxes respectively twenty-five *percentum* greater "per mile than as fixed in said Act.'" (Italics ours.)

But one construction can be placed on this statute, i. e. that it increased by twenty-five per cent. the rate of taxation on all roads which were taxed by the Act of 1884. It did not seek to subject any property which had been theretofore exempt, and its operation was expressly confined to the "several railroad companies mentioned and referred to in said Act"; manifestly meaning those that were referred to for purposes of taxation, and having no relation whatever to those that were excused because of their exemption.

The Act of 1890, page 13, which practically re-enacted the law of 1894, contains this provision, "*provided no railroad shall be subjected to taxation while exempt by its charter*", again recognizing and affirming any exemption that existed in the charter of any railroad company, absolving all such from taxation, and making the recitals of the charter the test as to the existence of the immunity.

Nor was the Code of 1892 designed to reach railroads enjoying exemptions, or repeal grants thereof.

Section 3379 is a part of the privilege license law of the State which is, the Court will observe, not a tax upon property, but a license upon an occupation or calling, and not within the purview of any of the grants of exemption. These privilege licenses have been a part of the law of the State of Mississippi since 1866, and have always been construed as being separate and apart from the regular taxation, being in the nature of a license for the privilege of doing business.

It has never been seriously contended by any of the railroads enjoying exemptions that they were not subject to this license charge for the right to do business.

Section 3774 provides generally the property which shall be exempt from taxation; that is, *the specific things that shall be exempt* without reference whatever to *persons or corporations who may have been exempted by charter, private act, or contract with the State.*

It is a law general in its character which does not apply to or repeal special statutes. *Generalia specialabus non derogant.*

This principle is expressly recognized in the Code, for by Section 8, Chapter 1 thereof, it is provided that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be *expressly* so provided herein."

Section 3875 repealed no exemption, because it provided a separate listing of exempt property in these words:—

> " and if any of said property is claimed to be exempt from
> " taxation, it shall be separately stated and the law cited
> " under which the claim is made".

Section 3877 constituting the Railroad Commission a Board of Assessors, evidently contemplated that there was exempt railroad property, because the said assessors were required to assess only the railroad property "liable to taxation in the State".

All of these provisions clearly show that the law-makers had before them the fact that certain property was exempt from taxation, and they will be utterly meaningless if they are treated as repealing all exemptions granted since the adoption of the Constitution of 1869, because there are no claims to exemptions in the State of Mississippi, as the court will observe by inspecting our statutes arising prior to 1869. The only one granted prior to that date, *i. e.* to the Mobile & Ohio Railroad Company was, by that corporation, expressly surrendered many years ago in settlement of a debt due the State.

It may be said that the complaint made is not of the invalidity of the subsequent statutes, but of the construction given by the court. Granting this to be true, the Federal question is still apparent. The application of any statute passed subsequent to the contract claimed so as to defeat or annul the contract, operates to deprive the party claiming thereunder of a right guaranteed him by the Federal Constitution and raises a Federal question.

It is immaterial whether the statute in express terms abrogates the contract, or the court by construing and applying the statute,

works out the same result; if it is passed after the making of the contract claimed, and is so interpreted or applied as to deprive the plaintiff in error of the benefit of the contract it is a violation of the Federal Constitution.

This was clearly stated in the case of the Bridge Proprietors vs. Hobokon L. & I. Co., 1st Wall., page 116. In that case Mr. Justice Miller said:—

"The true and rational rule is, that the court must be able "to see clearly, from the whole record, that a certain pro- "vision of the Constitution or Act of Congress was relied on "by the party who brings the writ of error, and that the "right thus claimed by him was denied."

"Looking at the record before us, and applying to it these "principles, we find no difficulty in the matter. The de- "fendants claim, under the Acts of 1860 of the New Jersey "Legislature, a right to build their railroad bridge or via- "duct, over the Hackensack river, inside the limits pro- "hibited by the Act of 1879. The plaintiffs say that to "permit this is to violate the contract which they have with "the State of New Jersey, and therefore the Act of 1860, "so far as it confers authority on the defendants, is made "void by the Constitution of the United States, because it "impairs the obligation of a contract. The State court dis- "missed the bill on those pleadings alone. It could not have "done this, without holding the Act of 1860 to be valid, as it "was the only authority on which defendants rested their "right to build any structure whatever across the Hacken- "sack river. In holding that Act to be valid, notwithstand- "ing plaintiff's claim that it was void as impairing the ob- "ligation of their contract with the State of New Jersey, a "decision was made within the very terms of the 25th sec- "tion of the Act of Congress of 1789."

"It is said, however, that it is not the validity of the Act "of 1860 which is complained of by plaintiffs, but the con- "struction placed upon that Act by the State court. If this "construction is one which violates the plaintiffs' contract "and is the one on which the defendants are acting, it is clear "that the plaintiffs have no relief except in this court, and

"that this court will not be discharging its duty to see that "no State Legislature shall pass a law impairing the obliga- "tion of a contract, unless it takes jurisdiction of such "cases."

Conclusion.

From the authorities above cited it must be apparent that there is absolutely no color to the motion to dismiss, and that being true the motion to affirm will not be considered. Nor can it be said that "it is manifest that the writ of error was taken for delay only, or that the question on which jurisdiction depends is so frivolous as not to need further argument." Rule 6, Section 5. Unless such is the case the motion to affirm will be denied.

We have purposely omitted any discussion at length of the merits of the case. If the motion warranted or called for any such, the argument which this court has recently heard in the other tax cases from the State of Mississippi sufficiently acquaint it with the issues involved.

Respectfully submitted,

EATON J. BOWERS,
Solicitor for Plaintiff in Error.

APPENDIX.

Giving Statutes Which It Is Claimed Subject the Gulf & Ship Island Railroad Company to Taxation.

Chapter 22, Page 29, Acts of 1884.

An Act to amend Sections 607 and 608 of Code of 1880, in relation to Privilege Tax on Railroads, and for other purposes.

Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That section 607 of the Code of 1880 be amended so as to read as follows: Each and every railroad company which will accept this act, and annually pay to the Auditor of Public

Accounts the taxes hereinafter provided for, and will signify their acceptance in writing, shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; two-thirds of which said tax shall be placed to the credit of the counties through which said railroads may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties, *provided,* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property, and for all purposes, any exemption in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries; *provided further* that the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company until the 1st day of February, 1886.

SEC. 2. *Be it further enacted,* That section 608 of the Code of 1880 be so amended as to read as follows: Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State Treasurer on the warrant of the Auditor, on or before the fifteenth day of December in each and every year, a privilege tax as follows, to-wit: The Mobile and Ohio Railroad Company and branches, one hundred dollars per mile, the Chicago, St. Louis and New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis and Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile and Texas Railroad Company, or the Louisville and Nashville Railroad Company, one hundred dollars per mile; the Mississippi and Tennessee Railroad Company, one hundred dollars per mile; the Alabama Central Railroad Company, one hundred dollars per mile; the Alabama Great Southern Railroad Company, one hundred dollars per mile; the Vicksburg and Meridian Railroad Company, eighty dollars per mile; the West Feliciana Railroad Company, thirty dollars per mile; the Grand Gulf and Port Gibson Railroad Company, thirty dollars per mile; the Mississippi Valley and Ship Island Railroad Company, forty dollars per mile; the Ship Island, Ripley and

Kentucky Railroad Company, twenty-five dollars per mile; the Mobile and Northwestern Railroad Company, twenty dollars per mile; the Greenville, Columbus and Birmingham Railroad Company, forty dollars per mile; the Natchez, Jackson and Columbus Railroad Company, forty dollars per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All the railroads not named herein and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempt from taxation by its charter.

SEC. 3. *Be it further enacted*, That section 604 of Code of 1880, be amended by striking out all in said section after the word "purchaser" in the twentieth line.

Approved March 12, 1884.

SECTION 5, CHAPTER 2, PAGE 23, ACTS OF 1886.

SEC. 6. *Be it further enacted*, That the Act entitled "An Act to amend Sections 607 and 608 of the Code of 1880, in relation to privilege taxes on railroads, approved March 13, 1884, be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said Act at sums twenty-five *per centum* greater respectively than the sums mentioned in said Act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five *per centum* greater per mile than as fixed in said Act.

SECTION 5, CHAPTER 2, ACTS OF 1890, PAGES 12 AND 13.

SEC. 5. That Section (1) of the Act of March 12, 1884, relating to railroad privilege taxes, be amended by striking out the last proviso thereof, and that the same be re-enacted as amended. That section two of said Act of March 12, 1884, be amended by striking out all after the word "to-wit", in line nine and inserting the following:—

The Alabama Great Southern, per mile.....$150 00
The Canton, Aberdeen and Nashville, per mile..... 100 00
The East Tennessee, Virginia and Georgia, per mile... 150 00

The Georgia Pacific, per mile	100 00
The Illinois central and branches, per mile	150 00
The Kansas City, Memphis and Birmingham, per mile	150 00
The Louisville and Nashville, or Mobile and New Orleans, per mile	150 00
The Louisville, New Orleans and Texas and branches, per mile	150 00
The Mississippi and Tennessee, per mile	150 00
The Mobile and Ohio and branches, per mile	150 00
The Memphis and Charleston, per mile	150 00
The Natchez, Jackson and Columbus, per mile	50 00
The Vicksburg and Meridian, or Alabama and Vicksburg, per mile	125 00
The West Feliciana, per mile	100 00
The Yazoo and Mississippi Valley, per mile	100 00
The New Orleans and Northeastern, per mile	150 00
The Gulf and Ship Island (Northern Division), or Gulf and Chicago, per mile	60 00
The Gulf and Ship Island (Southern Division), per mile	60 00
The Mobile and North-Western, per mile	150 00
And all other railroads constructed or to be constructed, per mile	100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed; and provided further, that if any railroad shall fail to pay the privilege tax required by law, and within the time provided by law, the same shall be assessed for taxation, and shall pay the *ad valorem* taxes levied for the year of such failure; and all the provisions of Sections two, three, four and five of the Act entitled "An Act to provide for the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof", approved April 3, 1888, shall apply in full force in all such cases; said Section two of said Act being amended by striking out the words "sixty days after the passage of this Act," in lines one and two, and by striking out the words "which said railroad has failed

to avail itself of the provisions of the first section of this Act and paid taxes according thereto," in lines three, four, five, six and seven, and also by striking out the word "next" after the words "June and July" in lines twenty-two and twenty-four, respectively, and said sections of said Act as amended are hereby re-enacted.

SEC. 6. This Act shall take effect on its passage.

Approved February 24th, 1890.

SECTION 3379, CHAPTER 108, ANNOTATED CODE OF 1892.

3379. *Railroads—*

Railroads are divided into four classes: First, second, third, and narrow-gauge, and privilege taxes are levied on them as follows:—

On each railroad of first class, per mile	$20 00
On the second class	15 00
On the third class	10 00
On narrow gauge class	2 00

The railroad commission shall, annually, on or before the first Monday in August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on, or before the first day of December.

SECTION 3875, CHAPTER 116, PAGE 860, ANNOTATED CODE OF 1892.

3875. *Assessment and Taxation of Railroads: Each Company to File Schedule.*—Each railroad company owning and operating a railroad, shall, on or before the first Monday in April in each year, file with the railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles or fractions thereof of its entire road-bed, switches and side-tracks, and showing how many miles or fractions thereof lie in this State, and in each county of the State, and in each city, town or village, and the value of the whole and each part thereof, as subdivided herein; the total amount of capital stock, its par value and its actual value and the value of its franchise; the number of engines and their respective values; the gross amount of receipts in the year pre-

ceding; the number of cars of all kinds, their classes and value; the number of depot-buildings and warehouse and other buildings; in what county and city, town, village or levee district located, and the value of each, including the lands and lots upon which the same are built; the value of all machine and car shops and stationary machinery and tools therein, and in what county, and city, town, village, or levee district located, including the land upon which the same are built; all real, personal, or mixed property belonging to the company within the State, not enumerated, with its value; the number of bridges and ferries in this State, in what county, city, town, village, or levee district situated, and the value of each, and specifying whether such value is or is not included in the value of the road-bed; a list of all lands in this State owned, describing the same, and giving the location and value thereof, the quantity of land used for depots and machine-shops, and its value aside from the buildings thereon; the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this State; and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made.

SECTION 3877, CHAPTER 116, PAGE 861, ANNOTATED CODE OF 1892.

SECTION 3877. *The Same: State Railroad Assessors.* The members of the railroad commission are constituted State railroad assessors, and they shall, upon the receipt or making and completion of the schedules provided for in the last two sections, assess all railroads, telegraph, sleeping-car, and express company property *"liable to taxation in the State,"* affixing its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, the capital stock engaged in the business in this State; and the railroad assessors may adopt other and further rules necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this State.

SECTION 3744, CHAPTER 116, PAGE 830, ANNOTATED CODE OF 1892.

3744. *What Property Exempt.*—The following property, and no other, shall be exempt from taxation, to-wit:—

(a) All cemeteries used exclusively for burial purposes.

(b) All property, real or personal, belonging to the United States.

(c) All property, real or personal, belonging to this State, or to any county or municipal corporation thereof.

(d) All property, real or personal, belonging to any religious or charitable society, or incorporated institution for the education of youth, used exclusively for the purpose of such society or institution, and not for profit.

(e) All property, real or personal, held and occupied by the trustees of schools, and school-lands of the respective townships for the use of public schools.

(f) Property appropriated to and occupied and used for any hospital or charitable institution.

(g) Wearing apparel of every person, not including jewelry or watches.

(h) Provisions on hand necessary for family consumption.

(i) All farm products, raised in this State, in the hands of the producer.

(j) One gun (for each owner) kept in private use.

(k) All poultry.

(l) Household furniture not to exceed two hundred and fifty dollars in value.

(m) Two cows and calves.

(n) Ten head of sheep or goats.

(o) All colts, foaled in this State, under three years old.

(p) Farming implements used for agricultural purposes.

(q) All property of agricultural and mechanical associations and of fairs used for promoting their objects.

(r) The libraries of all persons.

(s) All pictures and works of art not kept or offered for sale as merchandise.

(t) The tools of any mechanic necessary for carrying on his trade.

(u) Ten head of hogs; and

(v) All permanent factories hereafter established in this State before the first day of January, 1900, for working cotton, jute, ramie, wool, silk, furs, metals, and all other manufacturing implements or articles of use in a finished state shall be exempt from taxation for a period of ten years. Any factory which has been abandoned for not less than three years, and commencing operations within two years from November 1st, 1896, shall be entitled to such exemption. A corporation, or person claiming exemptions under this paragraph (v) shall apply in writing to the auditor of public accounts, giving full information as to the property proposed to be exempted, the kind of articles to be manufactured; and the auditor, with the written advice of the attorney-general, shall determine whether the property is exempt. The auditor shall notify the assessor of the county or municipality, in writing, of his decision in the premises, stating distinctly the property to be exempted and the date when the exemption begins and ends. A factory or manufactory belonging to or being a trust, combine, or pool, shall not enjoy exemption from taxation.